No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs. Charles W. Mapes, CHARLES W. MAPES, JR., GLORIA MAPES, and CHAS. W. MAPES COMPANY (a co-partnership),

Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF FOR APPELLANT.

SAMUEL PLATT,
First National Bank Building, Reno, Nevada,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT CONCERNING JURISDICTION.

On the 22nd day of June, 1946, the appellant, as the then plaintiff, filed his complaint in the District Court of the United States, in and for the District of Nevada, and later an amended complaint (Tr. Vol. 1, p. 1), alleging diversity of citizenship, in that the appellant, the then plaintiff, is and was a citizen of the State of California, and that appellees, the then defendants, were and are all citizens of the State of Nevada; and that the amount in controversy exceeds,

exclusive of interest and costs, the sum of three thousand ($3,000.00) dollars.

Jurisdiction of the United States District Court is and was based upon Title 28 U.S.C.A., Section 41, which provides:

> "The District Court shall have jurisdiction as follows: (1) * * * or when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, and * * * (2) is between citizens of different states * * *"

The controversy was tried before the court without a jury and a judgment was entered on the 23rd day of April, 1947, in favor of the defendants. (Tr. Vol. 2, p. 908.)

On the 24th day of May, 1947, the plaintiff-appellant filed notice of appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the District Court of the United States in and for the District of Nevada. (Tr. Vol. 2, p. 925.)

Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based upon Title 28 U.S.C.A., Section 225, which provides:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error, final decisions: First in the District Courts in all cases, save where a direct review may be had, in the Supreme Court, under Section 345 of this title."

STATEMENT OF THE CASE.

The appellant (who was the plaintiff in the trial court), together with the defendant Charles W. Mapes, Jr., entered into a written agreement with the defendant, Irene Gladys Mapes, mother of Charles W. Mapes, Jr., for a lease of a hotel she contemplated building in Reno, Nevada. (Tr. Vol. 2, p. 908.) The agreement bears date September 24, 1945, the date it was signed by Irene Gladys Mapes, but it was not executed by all parties until October 4, 1945. On April 10, 1946, the defendant, Irene Gladys Mapes, through her attorney, H. R. Cooke, Esq., notified the plaintiff that she would not grant a lease. No reason was given plaintiff for the repudiation of the agreement. The trial court found that the repudiation was "without good cause". (Tr. Vol. 2, p. 918, Par. 14.) The plaintiff (this appellant) then filed this suit in equity for the specific performance of the contract. The defendant, Charles W. Mapes, Jr., son of Irene Gladys Mapes, having refused to join as a co-plaintiff in the suit, was made a party defendant. Later, it being discovered that Irene Gladys Mapes had conveyed an interest in the property, an amended complaint, by leave of court, was filed. (Tr. Vol. 1, p. 2.) The trial court found that this conveyance was made with knowledge by the defendants of the contract for lease. (Tr. Vol. 2, p. 915, Par. 2.) The case was tried before the court, and a decree and order was entered in favor of the defendants, denying the plaintiff's prayer for specific performance and equitable relief. This appeal is from that decree and order.

FURTHER FACTS, BRIEFLY STATED, AS ESTABLISHED BY THE EVIDENCE.

The plaintiff-appellant, was an experienced and reliable hotel operator. (Depositions, Tr. Vol. 2, p. 709 et seq.) Learning that the defendant Irene Gladys Mapes was contemplating building an hotel in Reno, Nevada, he came to Reno, sometime in March or April, 1940, and interviewed her at her home with respect to an association as an operator and manager thereof. Later in that year another conversation was had, but negotiations were suspended during the war and again renewed in April or May of 1944. (Tr. Vol. 1, pp. 172, 176; Vol. 2, p. 438.) Another interview took place in Reno in September, 1944, during which it was suggested that Charles W. Mapes, Jr., the son of the defendant Irene Gladys Mapes, was to be associated with plaintiff, to which the plaintiff agreed. (Tr. Vol. 1, p. 180.)

On August 14, 1945, at the request of the defendant, Irene Gladys Mapes, the parties met in San Francisco and discussed, for two or three days with the builder and architect, tentative plans for the hotel. (Tr. Vol. 2, p. 487; Vol. 1, p. 334, et seq., p. 181.) On this occasion the plaintiff escorted the defendants about San Francisco and showed them various hotels in that City. (Tr. Vol. 1, p. 186.) Later, the parties met again in San Francisco and again discussed hotel plans with the architect and builder. (Tr. Vol. 1, p. 188.) On September 21, 1945, plaintiff and the defendant son, Charles W. Mapes, Jr., came to Reno for further discussion. (Tr. Vol. 1, p. 188.) Upon the following Sun-

day, September 23, 1945, at the home of the defendant, Irene Gladys Mapes, the parties and defendants' attorney, H. R. Cooke, discussed the terms and provisions of the contract, later entered into, admitted in evidence herein and marked Exhibit "C". (Tr. Vol. 1, p. 190.)

A general form of contract was submitted by the plaintiff, which it was agreed should be put in legal form by defendants' attorney and sent to the plaintiff at the Biltmore Hotel, Los Angeles, California. (Tr. Vol. 1, p. 192; Vol. 2, p. 695.) The plaintiff left Reno that night. The next day the contract was signed by the defendant, Irene Gladys Mapes, duly witnessed and sent by mail that night to the plaintiff at Los Angeles, California. (Tr. Vol. 1, p. 192.) Upon its receipt, the plaintiff phoned the defendant Irene Gladys Mapes, and called her attention to an inadvertence in the contract with respect to plaintiff's guarantee for faithful performance, as set out in paragraph 9 of the contract. The plaintiff was authorized over the phone by the defendant, Irene Gladys Mapes, and her attorney, to interline the correction, which he did. (Tr. Vol. 1, p. 193.) Later, on October 4, 1945, plaintiff returned to Reno with the contract, the initials of all parties were placed opposite all interlineations and the contract was duly signed, witnessed and executed by all of the parties in the office of defendants' attorney, on that day. (Tr. Vol. 1, p. 193; Vol. 2, p. 568.)

The plaintiff then and there gave the defendant, Irene Gladys Mapes, his check for ten thousand

($10,000.00) dollars, his half of the amount required, as a "guarantee" of good faith. (Tr. Vol. 2, p. 605; Vol. 1, p. 449.) The amount was later deposited by her to her account in the bank. (Tr. Vol. 1, p. 450.) This payment was, and still is, retained by her and was only offered in return subsequent to April 10, 1946, and after she had repudiated the contract, "without good cause". (Findings, Tr. Vol. 2, p. 941.)

The defendant, Irene Gladys Mapes, fully understood the agreement. (See her testimony, Tr. Vol. 2, pp. 458-464.)

From October 4, 1945, the date the contract was executed, and the good faith money paid, all through the ensuing months up to April 10, the following year, 1946, the utmost cordiality prevailed. The time limitations of the contract were waived. (Findings, Tr. Vol. 2, p. 918, Par. 12; p. 920.) Up to April 1, 1946, "the defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., and plaintiff, have been conferring at various times and intervals and during said time treated and considered said agreement in full force and effect". (Quoted from Findings, Tr. Vol. 2, p. 917, Par. 10.) That none of the defendants, "by word, act or conduct" up to April 10, 1946, ever informed the plaintiff "that they would not enter into and execute a lease for the said premises". (Findings, Tr. Vol. 2, p. 918, Par. 12.)

On the 28th day of December, at the request of the defendant, Charles W. Mapes, Jr., the plans for the hotel were further discussed at the office of the builder at Oakland, California, with the plaintiff in attend-

ance. (Tr. Vol. 1, p. 362.) The builder, Mr. Moorehead, at other times discussed plans with the plaintiff. (Tr. Vol. 1, p. 334, et seq.) Cordial letters were sent to plaintiff by the defendant, Charles W. Mapes, Jr., on November 20, 1945 and December 3, 1945. (Tr. Vol. 2, p. 636, et seq.; Vol. 1, p. 259.)

The defendants caused to be published in local newspapers, large feature articles, conspicuously featuring plaintiff-appellant as one of the managers of the hotel. (Tr. Vol. 2, p. 643.)

On April 10, 1946, the defendant, Irene Gladys Mapes, suddenly repudiated the contract through her attorney, who told the plaintiff-appellant that his client, the defendant, Irene Gladys Mapes, would not go through with it. (Tr. Vol. 1, p. 280.) The trial court found that this repudiation was without good cause. (Tr. Vol. 2, p. 918, Par. 14.) The plaintiff-appellant then brought this suit in equity for specific performance.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Assignment No. I.

The trial court erred in denying plaintiff-appellant relief by way of specific performance, for the reason that the findings of fact of the trial court sustain every material allegation of plaintiff's amended complaint as follows:

(a) "That the parties entered into a written agreement for the leasing of the hotel premises." (Tr. Vol. 2, p. 915, Par. 3.)

(b) "That since the execution of the agreement, plaintiff has been ready and willing to receive from the defendant, Irene Gladys Mapes, a lease of said hotel structure containing the *terms which were settled and agreed upon by said agreement.*" (Tr. Ibid., Par. 9.)

(c) "That from the date of the execution of the agreement, up to and including about April 1, 1946, all the parties treated and considered the agreement in full force and effect." (Tr. Ibid., Par. 10.)

(d) That the plaintiff and defendant, Charles W. Mapes, Jr., at various times examined and discussed plans for furnishing and equipping the hotel as provided in the agreement. (Tr. Ibid., Par. 11.)

(e) That plaintiff deposited ten thousand ($10,000.00) dollars with defendant, Irene Gladys Mapes, as a guarantee of good faith, and which was accepted by her as a full compliance with the provisions of the contract. (Tr. Ibid., Par. 16.)

(f) That this deposit was retained and was not offered to plaintiff until about April 10, 1946; and from the date of the contract up to April 10, 1946, none of the defendants, by word, act, or conduct, informed the plaintiff they would not execute a lease. (Tr. Ibid., Par. 12.)

(g) "That on or about April 10, 1946, the defendants, *without good cause,* repudiated said written agreement and declined and refused further performance on their part under it, and stated to plaintiff that no lease would be tendered, granted or entered into as contemplated by said agreement." (Tr. Ibid., Par. 14.)

(h) "The time limitations of the agreement have been waived by all parties." (Tr. Vol. 2, p. 920.)

(i) That the defendant, Irene Gladys Mapes, upon the execution of the agreement was represented by an attorney at law. (Tr. Vol. 2, p. 917, Par. 8.)

(j) It was always contemplated that the net earnings of the contemplated lease would be shared equally by plaintiff and defendant, Charles W. Mapes, Jr. (Tr. Vol. 2, p. 919, Par. 17.)

(k) "The contract under discussion here is definite as to description of the property, the term, the price of rental and the time and manner of payment." (Tr. Vol. 2, p. 921.)

These findings, alone, entitle plaintiff to a decree of specific performance.

Assignment No. II.

The trial court was in error in not applying the well recognized principle of law and equity that "Where a person by his contract charges himself with an obligation possible to be performed, he must perform it." (13 *C. J.* 635, Section 706.) The contract obligated the defendant, Irene Gladys Mapes, to negotiate with the plaintiff for the remaining provisions of the lease, which were clearly incidental and subordinate to the material and essential terms expressly set out in and agreed upon by the contract. She violated this obligation by repudiation of the contract "without good cause". (Findings, supra.) She should be compelled in equity to perform. By failing so to de-

cree, the trial court erroneously upheld her in her confessed and unwarranted violation.

ASSIGNMENT No. III.

The trial court's decree was based in part upon the reasoning "That it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations as to terms, conditions and details, provided for in the agreement". (Findings, Tr. Vol. 2, p. 917, Par. 9.) The court erred in attempting to excuse defendants' utter lack of performance by expressing a mere speculative doubt that plaintiff, who had admittedly faithfully performed, would not continue to perform. The court erred in attempting to substitute its judgment for that of the plaintiff, who had the exclusive right under the contract to determine whether he would accept a tendered lease or not. The court further erred in not compelling the defendants by decree to tender a lease, which in law and equity they were obligated to do. The court further erred in not recognizing its continued equitable powers to see to it that the tendered lease contained the material and essential provisions expressly provided in the contract, and that the additional provisions "to fully effectuate the intent and purposes of the parties" (see Agreement, supra), should be fair, reasonable and just.

ASSIGNMENT No. IV.

The court based its conclusion primarily that because the parties contemplated further negotiations

before a lease could be executed, the plaintiff is not entitled to specific performance. The court erroneously failed to consider that the contract is still in full force and effect, is a good and valid contract, containing terms definitely agreed upon, that there is no forfeiture clause in it, that it was repudiated by the defendants without good cause, that the defendants admittedly failed to perform, for which performance the plaintiff paid them ten thousand ($10,000.00) dollars as an evidence of good faith, that the contract contained the material and essential elements of the lease, which is all that is required to make it enforceable, that the defendants having arbitrarily repudiated their right to negotiate, waived that right and were estopped from asserting it, and that their unwarranted breach of the contract gave the plaintiff an immediate right of action.

ASSIGNMENT No. V.

The court erred in reaching the inconsistent conclusion that though the defendants breached the contract without good cause, and by their acts waived, refused and repudiated further negotiations, yet they were entitled to recover because the contract provided for further negotiation.

ASSIGNMENT No. VI.

The contract clearly shows that it was the intention of the parties that the lease should contain the material and essential elements therein specifically agreed upon, and that only incidental matters and usual and

customary conditions to effectuate this intent should be further negotiated. Such a contract should be specifically enforced in equity. The trial court erred in not so decreeing.

ASSIGNMENT No. VII.

The contract is complete in its essential terms and it was the intention of the parties that they should be bound by it. The execution of the lease was a formality "to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement". (Contract, Par. 10.) The trial court, therefore, erred in not decreeing specific performance.

ASSIGNMENT No. VIII.

The defendants, having repudiated the contract without cause, before tendering a form of lease or negotiating therefor, should be obligated in equity, so to do, by court decree. The court through equitable power of supervision should have decreed that the lease so tendered should "fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement". The trial court erred in denying this relief to the plaintiff.

ASSIGNMENT No. IX.

The trial court by its decree, brings, in error, the interposition of equity, to support the defendant, Irene Gladys Mapes, in her established and conceded unwarranted violation of the contract.

ASSIGNMENT No. X.

The contract is complete and definite in itself. It contains no condition that it shall become definite, final or absolute only upon the happening of some future contingency. It is a contract *in praesenti,* for which the plaintiff was obligated to deposit, and did deposit, ten thousand ($10,000.00) dollars in cash as an evidence of good faith. The trial court erred in not compelling the defendants, by decree, to perform.

ASSIGNMENT No. XI.

The fact that the contract provided for the formal and later execution of a lease, did not negative the existence of the contract, the terms of which had been assented to and agreed upon. The trial court erred in not so decreeing.

ASSIGNMENT No. XII.

All the terms, covenants and conditions of the *contract* agreed upon, are complete, definite and certain. The trial court was in error in decreeing otherwise. The additional conditions to be incorporated in the *lease,* the parties have agreed, should be made certain and complete by negotiation. They provided the method by which certainty and completeness was to be reached. They acted within the rule of equity that "that which may be made certain *is* certain". The trial court erroneously failed to follow this well-established maxim of equity. The defendants, captiously and without cause, having repudiated the contract, which contained the essential elements of the lease,

and refused to negotiate, the court should have ordered them to negotiate, and on failure of which the court should have decreed the additional, reasonable, subordinate and customary provisions of the lease, as contemplated by the contract. "Equity regards as done that which ought to be done."

ASSIGNMENT No. XIII.

The trial court's conclusion (Decision and Findings, Tr. Vol. 2, pp. 922-923) that specific performance should be denied because the parties were antagonistic, is erroneous and not supported in equity. Every suit for specific performance involves antagonism. This is no ground in equity for denying relief. The court erroneously concluded that this is a suit to enforce an agreement to form a partnership. The present suit is for a decree to compel the performance of an agreement to lease. Under the facts of this case, the plaintiff's rights may not be destroyed because of the association of a co-lessee, who is a son of the principal defendant, and who joined with his mother "for no cause" inequitably and unconscionably, to defeat plaintiff of his just rights.

ASSIGNMENT No. XIV.

The evidence and the findings establish conclusively that the defendants acted with the utmost bad faith. The equities are overwhelmingly with the plaintiff. The trial court's finding (supra) that the defendants repudiated the agreement without cause, is a plain conclusion that the agreement is still in full force and

effect. Why should not the defendants be compelled to perform? In support of the contention that the defendants acted with the utmost bad faith appellant refers to the evidence of all the witnesses, detailed extracts from which by page and number will be specifically designated later in this brief.

Assignment No. XV.

The trial court erred in failing to conclude that the material and essential provisions to be contained in the lease were agreed upon with certainty, definiteness and completeness, and that it was the intention of the parties later to negotiate for minor, customary and subsidiary conditions "to fully effectuate the intent and purposes of the parties" to the contract. (Quoted part from Agreement, par. 10, Court's opinion. Tr. Vol. 2, p. 913, Par. 10.) That the contemplation of a formal lease did not destroy the completeness and certainty of the contract.

Assignment No. XVI.

It was the plain duty of the defendant owner of the property to have submitted a form of lease to the plaintiff for his consideration, before her sudden repudiation of the agreement without good cause. The plaintiff was foreclosed by the unwarranted act of repudiation from his right, guaranteed by the agreement, to give consideration to any proposed terms to be embodied in the lease. The trial court by denying plaintiff relief by way of specific performance, erroneously deprived plaintiff of this right, in the face of

the court's finding that the agreement was still in full force and effect.

ASSIGNMENT No. XVII.

The plaintiff has no plain, speedy and adequate remedy at law. Damages may not be assessed for the admitted breach of the contract, because they are purely speculative. Damages may not be estimated for a new and untried business. The court, by its decree for defendants, erroneously deprived plaintiff of a remedy, and ignored the well established doctrine that "where there is a right there is a remedy."

ASSIGNMENT No. XVIII.

The plaintiff had already performed under the contract, before it was repudiated. He deposited ten thousand ($10,000.00) dollars as an evidence of good faith. He conferred on plans for the building and made suggestions later approved and adopted. He negotiated for furnishings, which he was obligated to supply (Findings Tr. Vol. 2, pp. 917-918, Par. 11)—all of which was well known to the defendants. The defendants summarily refused further performance, without good cause.

ASSIGNMENT No. XIX.

The trial court has erroneously failed to take into consideration that the contract was definite and complete in all its material and essential terms; that it was the plain intention of the parties to be bound by these material and essential terms; that an agreement for a lease which contains the material and essential

terms is enforceable in equity by specific performance; and that it was clearly the intention of the parties to embody in the lease only such subsidiary and customary provisions "to fully effectuate the intent and purposes of the parties" as definitely and completely agreed upon.

ASSIGNMENT No. XX.

The trial court's dismissal of the plaintiff, in the light of the findings and the evidence, is inequitable, unconscionable and unjust.

THE FINDINGS OF FACT OF THE TRIAL COURT SUSTAIN EVERY MATERIAL CONTENTION OF PLAINTIFF-APPELLANT. THE DECREE FOR THE DEFENDANTS-APPELLEES IS AGAINST LAW, EQUITY AND GOOD CONSCIENCE.

The first specification of error assigned herein (supra) sets forth the material findings of the trial court, which undoubtedly sustain plaintiff-appellant's cause of action and entitle him to a decree of specific performance. These findings establish that there was a written contract between the parties; that the contract contained "terms which were settled and agreed upon by said agreement"; that there was a meeting of the minds as to these settled terms; that as to these settled terms, the contract was complete, certain and definite; that "all the parties treated and considered the agreement in full force and effect"; that the plaintiff-appellant "deposited Ten Thousand ($10,000.00) Dollars with the defendant, Irene Gladys Mapes, *as a guarantee of good faith,* and which was accepted by

her *as a full compliance with the provisions* of the contract; that the defendant, Irene Gladys Mapes, upon the execution of the agreement was represented by an attorney at law; that "the contract under discussion here is *definite* as to description of the property to be leased, the term, the price of rental and the time and manner of payment"; and that the defendants repudiated the contract *"without good cause"*. (Italics in this paragraph supplied.)

As strikingly significant as these findings are in establishing a complete, definite and certain agreement of the terms, covenants and conditions contained in it, the further observation may be here made, that these findings may be amplified by an analysis of the contract itself, which, beyond contradiction, proves conclusively that there was a complete meeting of the minds on all the material and essential terms, covenants and conditions to be contained in the lease. What these material and essential terms are, will be later enumerated herein in detail. Further, the defendant, Irene Gladys Mapes, testified that she fully understood these agreed terms and that she assented to them. (Tr. Vol. 2, pp. 458-464.) It therefore follows that the conclusions of the trial court in adjudging that the contract was incomplete, is inconsistent with the court's findings and the agreement itself, which establish conclusively that its material and essential provisions were definitely agreed upon, and that it was violated by the defendant, Irene Gladys Mapes, who wilfully and *"without good cause"* refused to tender a form of lease, which she was obligated in law

to do, and who deliberately broke her promise to negotiate for the subsidiary terms of the lease, which she had solemnly promised to do. The trial court upholds her in her illegal violation, and protects her in her concededly broken promise! Furthermore, though the plaintiff-appellant had fully performed, and though he was guilty of no breach, and though the time element has been waived by both parties, and though all parties treated the contract as in full force and effect, and though the plaintiff-appellant was led on in the belief that he would get a lease, the trial court dismisses him without remedy! Such a determination appears revolting to all principles of equity and fair dealing.

THE AGREEMENT ESTABLISHES A COMPLETE CONTRACT, AND A COMPLETE MEETING OF THE MINDS WITH DEFINITENESS, CERTAINTY AND FINALITY AS TO THE MATERIAL AND ESSENTIAL PROVISIONS TO BE INCORPORATED IN THE LEASE.

An examination of the agreement clearly discloses that the parties were in complete accord upon the material and essential provisions to be incorporated in the lease, as follows:

1. The parties to the lease.
2. The hotel to be leased.
3. The term of the lease.
4. The time for possession by the lessees.
5. The consideration or rental price to be paid.
6. The time of payment.

7. The furnishing and equipping of the hotel by the lessees as a first class hotel and apartment building.
8. The delivery of a chattel mortgage on all furniture, fixtures and equipment by the lessees to the lessor to secure the rental payment.
9. A guarantee by the lessees that the *total income from the entire building* will be in an amount at least sufficient to cover payments required of the lessor for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period.
10. A plain understanding and agreement, from the foregoing paragraph (9) that the lessor agrees to pay taxes, upkeep and insurance.
11. A definite, unequivocal, and plainly stated understanding and agreement that the lease shall contain the foregoing provisions to fully effectuate the intent and purposes of the agreement.

It will be noted from the above, that not only were the main essentials of the lease agreed upon, but the parties went further than that. The plaintiff-appellant was bound by the joint obligation with his co-lessee to furnish and equip the hotel as a first class hotel and apartment building; to execute and deliver a chattel mortgage thereon to secure the rental payments, and to guarantee that the total income from the entire

building will be an amount sufficient to cover payments required of the lessor for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of the building within the lease period. All of the main essentials and additional provisions were agreed upon without condition or qualification. There is nothing expressly set forth in the agreement that makes this accord contingent upon the happening of any future event. It was a definite and complete meeting of the minds on the essentials without any equivocation, and for which the plaintiff-appellant paid ten thousand ($10,000.00) dollars as an evidence of good faith. As such, it was a completed contract; and though the parties agreed that they would negotiate further for the other incidental provisions to go into the lease, this did not destroy or effect the completeness and binding effect of the contract itself. The agreement bound the defendant, Irene Gladys Mapes, to further negotiation. This "without good cause" she refused to do. She wilfully and suddenly repudiated the contract; and the plaintiff-appellant was denied the privilege or benefit of further negotiation. She cut the plaintiff-appellant off from a right guaranteed him by the contract. In this suit, he seeks specific performance to compel the defendant Irene Gladys Mapes to perform in accordance with her solemn commitment. There is no indefiniteness or incompleteness or ambiguity about this commitment. Neither is there any indefiniteness nor incompleteness about the agreed provisions to go into the lease. The trial court has misconceived the binding force and effect of the contract.

THE PLAIN INTENTION OF THE PARTIES IS DISCLOSED BY PARAGRAPH 10 OF THE AGREEMENT. (Tr. Vol. 2, p. 913, Par. 10.)

Paragraph 10 of the agreement clearly shows the intention of the parties. This paragraph reads as follows:

> "The said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected."

It is manifest that the main concern of the parties was to arrive at a complete understanding and agreement as to the material and essential provisions of the lease. This they definitely and completely accomplished. Their next concern was to see to it that the lease contained "all necessary provisions *to fully effectuate the intent and purpose*" of the agreement "and also to definitely set forth all usual or necessary conditions to the end *that the rights and interests of each party shall be properly conserved and protected*". This Paragraph 10 is manifestly an express written recital of the intent of the parties, and it is difficult to see how it may be overlooked or ignored. The only apparent rational interpretation of this paragraph seems to be that the parties intended that the lease was to contain such subsidiary provisions and "all usual or necessary conditions" so as to carry out the material and essential provisions already agreed upon. In a word, the lease was intended to follow the con-

tract and not to vary it. Further, the lease was intended to protect and conserve the "rights and interests of *each party*" as established by the agreement. It was never intended that the plaintiff-appellant was to receive no protection at all; that his good faith ten thousand ($10,000.00) dollar deposit was a gratuitous advancement to be used at the pleasure of the recipient, and that the defendants at will, for no good cause or reason, could breach their solemn promises and cast out the appellant without right or remedy or relief. Neither was it intended that the contract, based upon negotiations and discussions, solemnly signed and witnessed by all parties, was a mere vagrant paper, to be torn up and disregarded by any party at will. This, in effect, is the conclusion reached by the lower court. But, it is respectfully submitted, that such a conclusion under a similar state of facts, is not sustained by other courts of high authority, as will be presently shown.

In a case for the specific performance of a contract, *West Heights Realty Corporation v. Adelman,* 152 Atl. 196, in which the contract provided that "the parties were to agree thereafter upon very important provisions, about which, the result demonstrates, they would be extremely liable to disagree." The following defenses in part were set up: namely, that the contract was too uncertain to be enforced by specific performance, and that the contract

> "Contemplated that before any lease or agreement should be in fact executed, there should be a further agreement between the parties, and terms

to be inserted in said lease were to be agreed upon that no such terms agreed upon in writing as required by the statute of frauds, and no completed agreement in writing or a memorandum of which is in writing has been made between the parties."

Ibid. page 198, paragraphs 3, 4.

The court overrules this defense in the following language:

"This defense, according to the argument of counsel for the defendant, is based upon the first of the two paragraphs near the end of the contract set forth above. It is argued that this paragraph of the contract provided that, in addition to the numerous minute provisions contained therein, the parties were to agree thereafter upon very important provisions, about which, as the result demonstrates, they would be extremely liable to disagree. This construction of the clause under consideration of course emasculates the whole contract and renders it unenforceable either at law or in equity. The result would be that these men met and negotiated for nine hours continuously, had their agreement in regard to the lease, so far as they had reached any, not merely noted down for reference upon a further conference for the continuation of the negotiation, but put in the form of solemn agreement in writing executed by them, and that all this labor was a nullity * * * that either party by failure to agree upon other terms to be discussed in the later proposed conference would have the absolute power to render null and void all that had taken so much time to negotiate and embody in a written contract."

"Such a construction in my judgment should be avoided if a meaning which would not invalidate the whole agreement can be fairly ascertained and placed upon the language in question."

The court further comments that this defense

"Seems to amount to a plain declaration that the entire contract was invalid in law and in equity; was a vain form; and that neither party acquired any rights of any kind under it."

The court concludes (p. 205) that the complainant is entitled to a decree of specific performance. The opinion of the Advisory Master in this case was affirmed by fourteen justices of the Court of Errors and Appeals of New Jersey, with no dissents.

In the case of *Bondy v. Harvey,* 62 Fed. (2d) 521, an agreement was entered into for a lease, which further provided that the lease should contain all of the usual and formal clauses *"to the mutual satisfaction of the parties hereto."* The defense was interposed that the contract was indefinite and incomplete because it provided that a lease to be drawn later was to contain clauses to the mutual satisfaction of the parties. The lower Federal Court sustained this contention, but was overruled by the Circuit Court of Appeals, Second Circuit. In the course of the opinion, the Circuit Court of Appeals (p. 523, paragraphs 5, 6) used the following language:

"The phrase 'to the mutual satisfaction of the parties' was held below to render the contract indefinite, a mere agreement to agree, and there-

fore unenforceable. But the contract is not indefinite. As stated above, the terms agreed upon are particularized and sufficient to constitute a valid lease. The phrase 'all the usual and formal clauses' we think was intended to state generally such clauses as the forfeiture, peaceful possession, warranty, surrender, re-entry, and other clauses which are familiar in leases. 'Mutual satisfaction' might be said to mean that the specified clauses should satisfy the parties, but in this thing nothing was left open to be agreed upon by the parties. The parties evidently thought they were bound by the contract. The 'Articles of Agreement' do state a contract between the parties. Details of familiar covenants, which as are usual in leases as protection for the parties, might well be left open for further specification without destruction of the contract or denial of remedy thereunder. (Adamson v. Alexander Milburn Co., 275 F. 148 (C.C.A. 2); Weed v. Lyons Petroleum Co. (D. C.) 294 F. 725; N.E.D. Holding Co. v. McKinley, 246 N.Y. 40, 157 N.E. 923; Ansorge v. Kane, 244 N.Y. 395, 155 N.E. 683; Newburger v. Amer. Surety Co., 242 N.Y. 134, 151 N.E. 155. These cases permit a reasonable interpretation that the parties impliedly understood their agreement to incorporate such usual and formal clauses as are put in leases when the lease is finally drawn. As said in United States v. McMullen, 222 U.S. 460, 472, 32 S.Ct. 128, 131, 56 L. Ed. 269: 'The power to change details, reserved by the United States, did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper.' The primary object of the court always is to find the intention of the parties

> as expressed in the agreement, and, if the parties place it in the power of the draftsman to state the usual and formal clauses, it is expected that this formality would be done to the reasonable satisfaction of the parties. In order to defeat the contractual obligations, it must appear that the terms omitted were so essential to the contract that it would be unfair to enforce the remainder. Palmer v. Acolian Co., 46 F. (2d) 746 (C.C.A. 8); Cohen & Sons v. Lurie Woolen Co., 232 N.Y. 112, 133 N.E. 370."

Later on in the opinion (p. 524), the court observes further in the following language:

> "Nor may a party be permitted to be arbitrary in entering into a lease for which he has contracted as here. The burden we have here is to find out whether the parties have reserved the right to be arbitrary or whether they have such right for a reasonable satisfaction controlling upon both contracting parties. We think that we should construe 'mutual satisfaction' as reasonable satisfaction and thus uphold the contract. The specific covenants were detailed by the parties."

In the case of *Adamson v. Alexander Milburn Co.*, 275 Fed. 148 (C.C.A. 2), the contract provided that it should be subject to an agreement between attorneys as to "the breadth and patentability of the claims". The trial court held that this condition rendered the contract incomplete and unenforceable, but the Circuit Court of Appeals reversed, and remanded the cause with direction to reinstate the complaint.

It will be observed in the case above cited that the court advocated a recognized principle "that where something is to be done to the 'satisfaction' of a particular person, and it is not simply a matter of personal taste, fancy or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be arbitrary or unreasonable, a simple allegation of dissatisfaction without a good reason is no defense." (Ibid. p. 157.) The case at bar presents a stronger state of facts. Here, the breaching contracting parties arbitrarily refused "without good cause" to confer or negotiate *at all* for the subsidiary terms of the lease. They arbitrarily closed the channels of negotiation, without giving the plaintiff-appellant a chance even to consider any suggestions or propositions. It further follows, in the light of the above authority, that there was every reason for reaching an accord, because of the established principle that all demands must be in law and equity reasonable and not arbitrary. The trial court (Tr. Vol. 2, p. 917, Par. 9) in expressing a doubt that the plaintiff-appellant would agree to suggestions or propositions from the other side, overlooked its own function as a court of equity to see to it that fairness and reasonableness were invoked. That equity courts have this power, and that its exercise has been prescribed as a duty, will be later shown by authority. As a matter of evidence, the record in this case overwhelmingly establishes, that up to the time of the sudden repudiation, all of the parties by word, acts and conduct firmly demonstrated that in their mutual belief the lease was a mere formality to effectuate the express conditions of the contract.

MAY LITIGANTS WITH UNCLEAN HANDS SEEK AND RECEIVE FAVORS FROM COURTS OF EQUITY? ARE THEY ESTOPPED FROM RELYING UPON DEFENSES FOUNDED UPON BROKEN PROMISES AND UNFAIR DEALING?

As has been repeatedly stated in this brief, the trial court found that the defendants repudiated the agreement "without good cause." No stronger pronouncement of the grievous wrong inflicted by the defendants upon the plaintiff-appellant could be made. Besides this, continuously, up to almost the very date of repudiation, the defendants, by word, act and conduct, led the plaintiff on to the belief that a lease would be granted. The trial court makes a finding, bearing upon this contention, in the following language:

> "that between the date of the execution of the agreement and April 10, 1946, the defendants, or either of them, did not by word, act or conduct, inform the plaintiff that they would not enter into and execute a lease on the said premises."
>
> (Findings, Par. 10, Tr. Vol. 2, p. 917.)

The implication from this finding undoubtedly is, that by failing "by word, act or conduct" to inform the plaintiff that they would not enter into and execute a lease on the said premises, the defendants led him to believe that they would. This conclusion is reenforced by another finding of the trial court (same ibid., Par. 10, Tr. Vol. 2, p. 917) that from the date of the execution of the agreement up to April 1, 1946, the defendants "treated and considered said agreement in full force and effect". If there may be anything further needed to establish the deception and unfair dealing of the defendants in leading the plaintiff on,

it may be found in the uncontradicted evidence of two of the main defendants themselves, and of the builder and contractor. These defendants evidenced so much confidence in the ability, integrity and financial influence of the plaintiff-appellant that they accepted his aid in procuring a loan to finance the construction of the building. This again, is established by the findings (Findings, Par. 5, Tr. Vol. 2, p. 916) as follows:

> "That plaintiff did attempt to assist in the procuring of a loan for the purpose of financing the construction of the contemplated hotel building by interviewing the officials of a bank and insurance company."

They sought his help and influence in attempting to acquire a twelve foot strip from the City of Reno as a part of the hotel site. (Tr. Vol. 1, p. 510.) They accepted his counsel and suggestions as to changes in plans for the hotel. (Tr. Vol. 1, p. 337.) They caused to be published in local newspapers feature articles, announcing him as the co-manager of the hotel. (Tr. Vol. 2, p. 643.) They wrote him friendly letters asking his aid to purchase bricks for the hotel. (Tr. Vol. 2, p. 637.) They knew that he was part-performing under his agreement in arranging plans for furnishing the hotel and they themselves actively participated in such negotiations. (Tr. Vol. 2, p. 659.) Besides all this, they accepted and retained, as an evidence of good faith, ten thousand ($10,000.00) dollars in cash which he had turned over to them, and which entire amount was to be forfeited in the event *"after said lease is executed"* there was failure in furnishing the

hotel and giving a chattel mortgage. (Agreement, Par. 8; Tr. Vol. 2, p. 912.) He sold another hotel, to devote his time and energy to this new enterprise. (Tr. Vol. 1, p. 263.) Is there any other conclusion to be reached in the face of these record facts, but that the defendants led the plaintiff-appellant on to a belief that he would get a lease, that the written agreement was binding and complete, that their sudden and unwarranted repudiation was little short of an outrage against fair dealing, and that their plea here, before a court of equity, to be sustained in their wrongful conduct, should be condemned as a gross affront to all established principles of equity and justice? May a litigant come before a court of equity, confess a solemn contractual relation, upon which he led the other party to rely, arbitrarily breach it "without good cause" and expect condonation and approval? Do equitable maxims demand fair dealing by *all* parties, or are the requirements so one-sided that the "unclean hands" of defendants may besmirch the very courts that boast of cleanliness and justice? Should defendants be estopped from setting up defenses founded upon broken promises and dishonor? These are queries which have been answered by the courts; and it seems clear that no premium has been put upon double-dealing and dishonesty.

EQUITABLE ESTOPPEL. THE DEFENDANTS WERE ESTOPPED FROM SETTING UP THEIR OWN WILFUL BREACH OF CONTRACT AS A DEFENSE.

Williston on Contracts and *Pomeroy on Equity Jurisprudence* declare the rule of equitable estoppel as follows:

> "It is more than a rule of evidence, it establishes rights, and is based upon the grounds of public policy and good faith. It prevents injustice by denying to one the right to repudiate his acts and representations to the detriment of another relying thereon."
>
> *Williston on Contracts,* Section 1508, citing *Wright v. The Farmers National Grain,* Circuit Court of Appeals, 7th Circuit, 74 Fed. (2d) 425.

> "Equitable estoppel is, therefore, a particular doctrine, based upon justice and conscience, which is the origin wherever it may be invoked, of primary rights of property or of contract."
>
> *Pomeroy Equity Jurisprudence,* Volume 3, page 179, Section 802.

> "Equitable estoppel in the modern sense rises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives, equity and fair dealing, to

create and vest opposing rights in the party who obtains the benefit of the estoppel."

Ibid., Section 802, page 180.

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity from asserting rights which might perhaps have existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."

Ibid., Section 804, page 188.

In the case of *Halsey, et al. v. Robinson, et al.*, 122 Pac. (2d) 11, the Supreme Court of California, invoking the doctrine of estoppel, made the following pertinent ruling:

"In view of our conclusion that the trial court was correct in finding that the plaintiffs were estopped to deny the validity of the June 7 writing, no further consideration need be given to plaintiff's contention that it was the intention of the parties to reduce their contract, (the letter of June 7th) to a more formal writing before being bound thereby * * * and having failed to do so there was no contract which could be enforced. As reflected by the findings of the trial court, the facts of this case which give rise to an estoppel afford no basis for the application of the rule of law which was embodied in that contention."

"Nor, in the light of the trial court's ruling as to estoppel, is it necessary to give consideration to the plaintiff's contention that there was no memorandum of the agreement to execute a lease sufficient to satisfy the statute of frauds."

Citation from page 13.

In a case decided by the New York Appellate Division and affirmed by the Court of Appeals, the doctrine of equitable estoppel was invoked in a somewhat similar case to the case at bar. An injunction was granted to prohibit a play being produced in England. The authors of the play had made an alleged contract to allow the play to be produced in England, but if a certain producer did not produce the play then the authors were to select a producer. The authors had treated the contract as binding. Later on they refused to select a producer and held they were not bound by the contract. The court held that they could not defeat the contract by failing to select a producer, and by treating the contract as binding they could not later disaffirm it. The findings of the lower court are very similar to the findings in the case at bar. Finding No. 49 in the case cited was that both parties treated the contract as in existence. Finding No. 50 established that the parties were allowed to enter into the contract without any notice that the contract would be disaffirmed. Finding No. 51, as in the instant case, was that the parties had waived the time element. It also appeared that a dispute other than the contract in question was the cause of the trouble. On page 216 of the citation noted hereunder, the court said:

"We are not concerned with the merits of that dispute (referring to a dispute outside of the contract in question) which were not in issue here. Certainly it afforded neither justification nor excuse for the repudiation by the authors of the contract which they had treated as continuing and to continue thereafter for a reasonable time, and which by their acts, writings, and representations they had induced the manager to regard as equally existent for the protection of his rights as of their own. The interference of their lawyer in the situation cannot relieve the authors of their responsibility under a situation which they had largely helped to create, nor destroy the effect of their acts, which had estopped them from denying the existence of a contract, to be performed within a reasonable time, at least, in reliance upon which the manager acted, made his own contract with the British producers, and embarked his own funds in the venture."

Nichols v. Hurtig and Seaman Theatrical Enterprises, 217 N.Y. Sup. 191, 217 App. Div. 117. Affirmed 157 N.E. 853.

The doctrine has been applied in preventing a person from asserting a constitutional protection:

"No principle has become more firmly established in the field of constitutional law than the fact that a person may effectively by acts or omissions waive a constitutional right to the protection of which he would otherwise be entitled, provided waiver does not run counter of public policy or public morals. This is nothing more than the equitable doctrine of estoppel applied in the realm of constitutional law and is uniformly up-

held in cases where the constitutional provision is solely protective of property rights."

Wilson v. The School District, 195 Atl. 90, 113 A.L.R. 1410, citation from page 1413.

In this, the Ninth Circuit, the doctrine was applied so as to prevent a right of forfeiture under a contract. This Honorable Court held that a party was estopped from asserting a right of forfeiture inasmuch as he had led the other party to believe forfeiture would not be exercised.

The Pokegana Sugar Pine Lumber Company v. Klamath Lumber and Improvement Co., 96 Fed. 34.

The Supreme Court of the United States held in a case in which there was a contract to discharge a mortgage if the mortgagor could construct a mill of a certain size, that a party to the contract was estopped to assert his contract right after a mill of a different size was constructed with the knowledge of the mortgagee defendant. The court announced the rule as follows:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain v. Seaman, 19 L. Ed. 554, citation from 560.

In a case in the Sixth Federal Circuit there was involved a contract for commission for the sale of

machines which would be sold in Italy. The defendants knew that the plaintiff had misconstrued the contract, but did not inform him of a proper construction. The court held they were estopped to deny the proper construction of the contract.

Letta v. Cincinnati Iron and Steel Co., 285 Fed. 707 (1922).

In another case decided in this Ninth Circuit, the plaintiff held a deed of trust on an insolvent company, with the right to foreclose if a receiver were appointed. A receiver was appointed and allowed to handle the company for three years, paying certain sums to the plaintiffs. It was held that the plaintiffs, due to their actions by not exercising the right of foreclosure within the three years, were estopped to foreclose.

First Federal Trust Co. v. First National Bank (Ninth Circuit), 297 Fed. 353.

See also:

Forstall v. Alberto, 24 Fed. 379;

Dickerson v. Colgrove, 25 L. Ed. 618;

Conway National Bank v. Pease, 82 Atl. 1068;

Forsyth v. Day, 46 Maine 176;

Horn v. Cole, 51 N. H. 287, 12 Am. Reps. 1011;

In re Shumaker, 121 Atl. 510;

The P. V. & K. Coal v. Kelly, 191 S.W. (2d) 231;

McSweeney v. The Equitable Trust Co., 22 Atl. (2d) 282;

White v. Ralph, 154 Pac. (2d) 167;

Medico Dental Building Co. v. Horton & Converse, 124 Pac. (2d) 56.

THE SOLEMN PROMISE OF THE DEFENDANTS TO NEGOTIATE WAS A CONDITION PRECEDENT WHICH THEY MAY NOT SET UP AS A DEFENSE IN THE FACE OF THEIR CONCEDED WILFUL REPUDIATION.

The provision in the contract providing for further negotiations is a condition precedent, in view of the fact that it was a condition existing after the formation of a contract, but precedent to the duty of performance. The findings of fact in this case establish that the contract which was repudiated without cause was in full force and effect from September, 1945 to April 10, 1946, the date of its repudiation. Therefore, a true condition precedent is disclosed.

The *Restatement of Contracts,* Section 250, defines a condition precedent:

> "In a restatement of this subject, 'condition' is according as the context indicates, either a fact (other than mere lapse of time) which, unless excused as stated in sections 294-307, (a) must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a 'condition precedent,' ".

Comment (c) under Section 250, *Restatement of Contracts,* says:

> "The nature of the promisor's duties involves further distinction. A duty arises whenever a contract is made. This duty is called absolute as nothing but lapse of time is necessary to make immediate performance by a promisor obligatory, since though time must elapse before performance need be rendered, lapse of time is not usually called a condition and is not so designated

in the restatement of this subject. The duty is conditional when an event other than lapse of time must happen in order to make the duty one of immediate performance."

Williston on Contracts stated the rule as follows:

"Generally in contracts, when reference is made to conditions, what is meant are conditions which become operative after formation of the contract and qualify the duty of immediate performance of a promise or promises thereunder—not conditions which qualify the existence of a contract or promise."

Williston on Contracts, Revised Edition, Volume 3, Section 666, page 1911.

THE DEFENDANTS MAY NOT RELY ON THE CONDITION PRECEDENT BECAUSE OF THEIR WILFUL FAULT AND BREACH.

A condition precedent may not be invoked if the promisor is at fault.

"Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability.

13 *C. J.* Section 722, Subsection 2, page 648.

"One who prevents or makes impossible the performance or happening of a condition precedent on which his liability and by the terms of the contract is made to depend, cannot avail himself of his non-performance. In other words, he who prevents a thing from being done shall never be permitted to avail himself of the non-performance which he, himself has occasioned."

12 *Am. Jur.* Section 329, page 885.

"One who prevents the fulfillment of a condition precedent, or its performance by the other party, may not take advantage of his act, and the performance of the condition is excused."

"Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents the fulfillment of a condition precedent or his performance by the adverse party, he cannot rely on such condition to defeat his liability."

17 *C.J.S.* Section 468b, page 969.

"If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise and a condition would have occurred, or the performance of a return promise been rendered except for such prevention or hindrance, a condition is excused."

Restatement of Contracts, Section 295.

"But when it is said that a condition is excused, it is meant that the liability of the promisee

arises in spite of the non-performance of the condition."

Williston on Contracts, Revised Edition, Volume 3, Section 676, page 1951.

"It is a principle of fundamental justice that if the promisee himself is the cause of the failure of performance, either of an obligation to him or of a condition upon which his own liability depends, he cannot take advantage of the failure."

Ibid, Section 677, page 1952.

The following case supports the above stated principle:

Baumer v. The Franklin County Distilling Co., 135 Fed. 2nd, 384, 6th Circuit, 1943. Certiorari denied, 64 Supreme Court 54, 320 U. S. 750, 88 L. Ed. 446.

This was a suit for the breach of a contract where the plaintiff had contracted for the right to sell two of the defendant's brands of liquor. After the contract had been performed for a short time, the defendant sold their rights of manufacturing one of the brands to a third party. Defendant argued they were no longer liable under the contract inasmuch as their manufacture of the liquor was a condition precedent to the liability under the contract. The court held at 135 Fed. 2nd. 389, quoting several Ohio cases:

" 'Where the obligations arising under a contract have attached, and subsequent thereto one party without the consent of the other does some act or makes some arrangement which prevents carrying out of the terms of the contract according to its terms, he cannot avail himself of this conduct to avoid his liability to the other party' ".

> "Even where the liability depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it."

Bellingham Securities Syndicate v. Bellingham Coal Mines, 125 Pac. 2nd. 668, 13 Washington 2nd, 370, 1942. This was an action for the collection of royalties in the operation of coal mine. The contract held that no royalties would be paid unless the defendants' net current assets were of a certain amount. The defendants had depleted their assets by the wrongful payment of dividends, and the defendants claimed there was no liability to pay the royalties since the condition precedent did not exist. The court said at page 680:

> "As respondent has made impossible a performance of a condition precedent upon which its liability, by the terms of the lease agreement, is made to depend, respondent cannot avail itself of its own non-performance; in other words, respondent may not invoke such condition to defeat its liability."

Thatcher v. Darr, 199 Pac. 938, 27 Wyo. 452, 1921. Here the defendant agreed to purchase the stock of an association provided patent to certain lands were issued to the association. The defendant alleged he was not liable under the contract on the ground that a patent on only a portion of the land was issued. The court found that the defendant had made complete performance of the condition impossible, and at 199 Pac. 947 the court said, quoting various cases:

" 'He who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, cannot avail himself of his own wrong and relieve himself from his responsibility to the obligee, and shall not avail himself, to avoid his liability, of a non-performance of such precedent condition which he has himself occasioned, against the consent of the obligee. It seems clear that where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event, that he will hold himself in readiness to cooperate where his cooperation is a necessary element in the happening of the contingency. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute, and must be performed as if the event had occurred.' "

" 'That a party to a contract, who by his own act prevents the happening of a condition, is estopped thereafter to see that such condition has not happened, no party to a contract can interfere to prevent the performance of any condition, and then claim any benefit or escape any liability for the failure of such performance.' "

See also:

Hayes v. Beyer, 278 N.W. 764, 284 Mich. 60;

Greenberg v. Sakwinski, 211 Mich. 498, 178 N. W. 234;

Foreman State Trust & Savings Bank v. Tauber, 180 N. E. 827, 348 Ill. 280.

SPECIFIC PERFORMANCE WILL BE GRANTED WHERE THERE IS A CONDITION PRECEDENT, AS HEREIN ESTABLISHED.

"A fact or event may be operative as a condition precedent or a condition subsequent by the specific words of the contract, by reasonable implication of the fact, or by construction of law for purposes of justice * * *. *This is the case, whether the remedy sought in an action is damages or specific performance.* Further, a performance of such a condition may be excused, or its actual occurrence be made inoperative, by reason of the conduct of the party in whose favor it is intended to operate * * *. *Again, this is true whether the remedy sought is damages or specific performance.*" (Italics supplied.)

Restatement of Contracts, Sec. 374, Subsection 1.

"Whenever, also, the plaintiff's delay or default in performing the terms and conditions on his part, at the time specified, *is caused by the defendant's own neglect, laches, or other conduct,* such omission will not be a ground for refusing the relief which he (the plaintiff) asks no matter how express may be the provision of the contract requiring a punctual performance and making it essential; a defendant cannot rely as a defense upon a breach which he himself has caused."

Pomeroy's Specific Performance of Contracts, Third Edition, Section 337, page 738;

Tyson v. Tyson, 149 Pac. 2nd. 674, 676;

The Hydraulic Power Co. v. Pettibone Cataract Paper Co., 183 N. Y. Sup. 373, 385.

The last cited was affirmed on appeal and the following statement was made:

"But if the actions were for specific performance it does not follow that a court of equity would be powerless to grant relief. The grant of the easement right is definite and certain. It is created by the contracts as of the time of the execution thereof. It is only in preservation of the equities of the defendants that detailed provision is embodied touching the manner of the use of right so created. The provisions for the functioning of the engineers conference all look to minimizing the injury to the defendants, and such do not serve to defeat or cut down the completeness or full benefit of the grant. All such relate to the manner of enjoyment and nothing more."

"Under such circumstances, these provisions which it is asserted create indefiniteness, defeating specific performance, are not of the essence of the contract, but are collateral thereto, and such doctrine has been repeatedly approved by the courts * * *."

"They (the defendants) repudiate the contract and seek, in these provisions as to enjoyment to find sufficient indefiniteness to defeat the entire instrument. Such efforts must fail. *The defendants have breached their contract in these particulars, and they cannot be heard in a court of equity to assert their own breach in support of claimed invalidity flowing therefrom* * * *."(Italics supplied.)

If it were essential to relief in this action, no doubt, the court of equity could, by mandatory provision, compel the defendants, even now, to select an engineer and participate in conferences as contemplated by the contract."

Ibid, 191 N. Y. Sup. 12, Citation from p. 16.

THE CONTRACT CONTAINS THE MATERIAL AND ESSENTIAL PROVISIONS OF THE LEASE AND IS ENFORCEABLE IN EQUITY BY SPECIFIC PERFORMANCE.

"An agreement which describes the premises sufficiently to identify them, which specifies the lessor and the lessee, and which fully designates the term and the amount of rent to be paid, is sufficiently complete."

35 *C. J.* 1202, Sec. 521 and authorities cited.

"It may be proper to decree specific performance of an agreement to enter into a contract, or an informal agreement, even though the parties contemplated the subsequent execution of a formal contract. This is true where the agreement contains the essential terms."

58 *C. J.* 941 and authorities therein cited.

"There is no disagreement whatsoever regarding the date of the commencement of the terms, the duration of the lease, the rental to be paid, when payable, and the specific description of the premises demised. These are all fully understood and agreed upon by the parties. It seems to follow, then, that as to the real necessary and material elements of the lease, the agreement is clear, definite, and complete, and upon these the parties seem to have been of one mind and the lower court in no doubt."

"This brings us to the real or main matter of controversy in this case, which is that, where the material elements of the agreement to lease are definitely agreed upon, that the contract is silent as to the general, usual, and ordinary covenants and conditions, can such a contract be enforced

by specific performance? In other words, are these covenants and conditions to be implied in law, or must they be definitely set forth in the agreement in order to be inserted in the lease by a decree of a court of equity? *While the contract provides 'that a lease shall be executed covering the agreement between the parties hereto as to said building',* it is silent as to the usual conditions, covenants and other general provisions contained in an ordinary lease."

"From an examination of the recognized text-books and the adjudicated cases, it appears that it has long since been the settled law, that, where there is no specification in the contract to execute a lease covering the usual, ordinary covenants and provisions, these will be implied by the courts of equity. * * *"

"This rule of law is recognized with some exceptions by the courts of this country. In 36 Cyc. 792, general principle of construction is briefly stated thus: 'A contract to execute a lease calls for a lease with the usual covenants.' "

"The annotator of L.R.A. states the rule to be 'specific performance of an agreement for a lease will be decreed with such covenants as are usual or incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect'. Note in 20 L.R.A. 36."

Bennett v. Moon, 31 A.L.R. 495, citation from pages 499-500.

Attention is respectfully called to the annotation following the case just cited, which firmly affirms and reinforces this principle.

"Can it then be said that the agreement to lease is so incomplete or uncertain as to make it impossible to decree specific performance? There is no uncertainty as to the names of the parties to the lease: there is no indefiniteness as to the description of the premises leased; no uncertainty as to the length of time the lease is to be enforced, nor as to the annual rentals, nor as to the amount to be paid in case of sale * * *. However, as the agreement to lease sets forth definitely in our opinion all the essential requirements of a lease, (see Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Jones, Landlord and Tenant, Section 137A; Tiffany, Landlord and Tenant, Section 66), it cannot be said, because other and different covenants might have been agreed upon, that what in fact has been provided for is too uncertain and indefinite to permit of specific performance."

"We are of the opinion that the agreement, standing by itself, is a complete contract, certain in its terms, and satisfied the statute of fraud."

Bushman v. Faltis, 150 N. W. 848, citation from page 851.

"Under the authorities, to create a valid contract of lease, but few points of mutual agreement are necessary: First there must be a definite agreement as to the extent and bounds of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and time and manner of payment. *These appear to be the only essentials;* the others, such as the covenant for the peaceful possession on the part of the lessor, diligent, proper, workmanlike, and

continuous working with a view to best results, both present and prospective, on the part of lessee; and where, as in this case, the rental is a share or a percentage of the profits, the disposition of the ore to the best advantage, the keeping of accurate and honest accounts, and making honest returns, are secondary and implied covenants growing out of the principal agreement." (Italics supplied.)

Cochrane v. Justice Mining Co., 26 Pac. 780, citation from 780-781.

"Plaintiff's theory of the case is that the agreement herein set out was an agreement to make a lease in the future and not a lease. It appears to us that the agreement contains all the essentials of a valid lease. To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. Jones on Landlord and Tenant, p. 170, 137a; Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715. However, plaintiffs' contention is based upon testimony of an understanding between the parties that they were later to execute a more formal contract. Whether an instrument is a lease in praesenti or an agreement to execute a lease in future is largely a question of the intention of the parties. Jackson v. Kisselbrook, 10 John. (N. Y.) 336, 6 Am. Dec. 341; Pac. Imp. Co. v. Jones, 164 Cal. 260, 128 Pac. 404. Nevertheless, where the parties have agreed upon all essential

facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. Jones on Landlord and Tenant, supra; Marcus v. Collins Bldg. & Const. Co., 27 Misc. Rep. 784., 57 N. Y. Supp. 737. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material. Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 74."

Levin v. Saroff, 201 Pac. 961, citation from pages 962-963.

See also

Bournique v. Williams et al., 225 Ill. App. Court Reports. page 12.

"A fundamental rule of this branch of equity jurisprudence is that whenever a contract concerning real property is, in its nature and incidents, entirely unobjectionable—that is, when it possesses one of those features which appeal to the discretion of the court—it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it. Slattery v. Gross, 96 Or. 554, 559, 187 Pac. 300, 190 P. 577; Restatement of the Law of Contracts, Section 360; 5 Pomeroy, Equity Jurisprudence 4869, Section 2167. A lease being a conveyance of an interest in land, there would seem to be no good

reason for withholding application of this rule to a contract of that character."

Temple Enterprises v. Combs, 128 A. L. R. 856, citation from page 871.

The above case indicates a family relation, as does the instant case. In commenting upon this relation the court states:

"We are not unmindful of the difficulties that stand in the way of performance by this 'house divided against itself'; but they are difficulties, not of Keller's making, but created by the defendants, and as we think, without legal justification. Equity would be a misnomer if a court assuming to exercise equitable powers should allow wrongful conduct to be used as a weapon of defence against one invoking its aid."

Supra, page 872.

"Specific performance of an agreemnt for a lease will be decreed with such covenants as are usual and incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect. Henderson v. Hay, 8 Bro. Ch. 632; Morgan v. Slaughter, 1 Esp. N. P. 8; Folkingham v. Croft, 3 Anstr. 700; Vere v. Loveden, 12 Ves. Jr. 179; Jones v. Jones, Id. 186; Church v. Brown, 15 Ves. Jr. 258; Robinson v. Cleator, Id. 526."

Note to 20 L. R. A., page 36.

In the case of *United States v. City of New York,* 131 F. 2nd. 909, (8th Circuit), which was a suit for specific performance of a contract, the court on page 915 declared as follows:

"It is enough for the purpose of deciding that the contract expressed a final binding agreement that the parties set forth and agreed to all but the comparatively insignificant details as to which they were bound to reach a reasonable understanding if and when they should require attention."

THE CONTEMPLATED LEASE IS AN INTEREST IN LAND AND THEREFORE EQUITY WILL ENFORCE SPECIFIC PERFORMANCE ALMOST AS A MATTER OF COURSE.

In the case of *Temple Enterprises v. Combs,* 100 Pac. 2nd. 612, 128 A. L. R. 856 (supra) the court declared as follows:

"We think, also, that the jurisdiction of equity is properly invoked because the plaintiff's damages would be difficult to ascertainment and that remedy would not, therefore, be as complete and adequate to accomplish the ends of justice as the remedy of specific performance (Rest. of the Law of Contracts, Section 361); and 'then too the lessee has a right to the land, and is not required to accept damages.' F. E. Norman Co. v. E. I. Dupont DeNemours and Co., Supra (12 Del. Ch. 155, 108 A. 746)."

The *Norman* case, cited above, states on page 746 thereof:

"It is almost a matter of course that a court of equity will enforce specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract is not an adequate remedy. Agreements to get or renew a lease are frequently enforced."

Section 360 of the *Restatement of Contracts* states in part:

> "Damages are regarded as an inadequate remedy for the breach of a promise (a) to transfer any interest in specific land * * * and specific performance will be decreed subject to the rules stated in Sections 359-380."

Under comment on the above section it is stated:

> "The remedy in money damages for breach of a contract for the transfer of a specific tract of land is regarded as inadequate without regard to quantity, quality or location. A specific tract is unique and impossible of duplication by the use of any amount of money. Specific performance is available to enforce a contract, *the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple.*" (Italics supplied.)

A lease is a recognized interest in land in the State of Nevada. Section 1545 N. C. L. 1929, as construed in the case of *Adams v. Smith,* 19 Nev. 259, 272, 3 Am. State Reps. 888, 9 Pac. 337, establishes that a leasehold interest is an interest in land.

> "Jurisdiction in equity to compel specific performance of a contract for the sale of land is firmly established; and the inadequacy of the remedy at law for damages need not be shown; it will be presumed as a matter of law."
>
> 91 Fed. Rep. 2nd, page 122, citation from page 124.

Many authorities from Federal and State jurisdictions are cited in the footnote in support of this principle.

"It is almost a matter of course that a court of equity will enforce a specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract is not an adequate remedy."

F. B. Norman Co. v. E. I. Dupont DeNemours and Co., 108 Atlantic Reporter 743, citation from page 746.

DAMAGES BY WAY OF PROFIT FOR THE PREVENTION OF OPERATION OF A NEW BUSINESS ARE TOO SPECULATIVE AND REMOTE TO BE RECOVERED IN A SUIT AT LAW.

The general rule as to a new business is laid down in 17 C. J., page 797, Section 18:

"Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation."

Where there is a denial of recovery the reason most frequently relied on is that the lessee's business is not an established one.

In *Hodges v. Fries,* 16 So. 682, the plaintiff was to open a millinery business but anticipated profits were disallowed as too remote, speculative and contingent.

The plaintiff rented premises for the purpose of conducting a barber shop in *Leslie E. Brooks Co. v. Long,* 64 So. 452, but failed to obtain possession. In denying profits the court said:

"The general rule applicable in such cases is that the lessee can recover from the lessor, for breach of contract to deliver possession of the leased premises, the difference, if any, between the rent contracted to be paid and the actual value of the premises. Prospective profits from the business that the lessee expected to conduct in said premises are too remote and speculative, dependent upon too many contingencies to be permissible as an admeasurement of damages in such a case."

The distinction between the established and unestablished business is well shown in *Favar v. Riverside Park,* 144 Ill. App. 86, an action for damages for failure to deliver possession of an amusement park concession:

"The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved to be paid by the lease. The same rule applies to a farm, a dwelling house, a hotel or business premises. The rule is varied in the case of an established business, in which case the measure of damages would be the difference between the rent and the value of the lessee's business, which would necessarily include an allowance for profits.

"But if the business were a new one, there could be no recovery for profits, and in that case the measure of damages would be restricted to those recoverable under the first rule recited. The profits which appellee might have made had she installed her show in appellant's park are purely speculative."

MORE AS TO THE ERRORS OF THE TRIAL COURT IN AVOIDING THE ABOVE ESTABLISHED PRINCIPLES.

While the trial court apparently conceded the law as established by the last cited above authorities, it erroneously concludes that the doctrine does not apply here because in the instant contract "there is here a definite provision that further negotiations were to be had and that no lease was to be executed except as a result of the required further ngotiations." (Tr. Vol. 2, p. 921.) The trial court ignored its own findings in that,

1. There was a complete and definite contract as to the material and essential provisions to be embodied in the lease. (See the trial court's opinion, Tr. Vol. 2, p. 921.) The trial court's opinion holds "that the contract under discussion here is definite as to the description of the property, the term, the price of rental, and the time and manner of payment." (Ibid., p. 921.) These are the material and essential elements, which under the authorities "create a valid contract of lease."

2. The trial court finds that the defendants repudiated the agreement "without good cause", by failing to negotiate further; and incongruously condones and relies upon their wilful breach of contract as a reason for denying specific performance. There is certainly nothing in law, equity or logic which supports such an irreconcilable conflict. (See Assignment No. V.)

3. The trial court further finds in effect that there was a definite and unequivocal meeting of the minds upon the material and essential provisions of the

lease, in the following language: "That since the execution of said agreement plaintiff has been ready and willing to receive from defendant Irene Gladys Mapes a lease of said hotel structure containing the terms *which were settled and agreed upon by said agreement of September 24, 1945*". (Tr. Vol. 2, p. 917, par. 9.)

May the query be propounded here that if the plaintiff was ready and willing to receive a lease containing these essential provisions agreed upon, is it equity to deny him a lease only and because the defendants broke their contract? In the name of equity and established precedents, did not this wilful and inexcusable breach give him an immediate right of action? (See Assignment No. IV.)

4. The trial court's decree ignores an elemental principle of contract law, namely, that "Where a person by his contract charges himself with an obligation possible to be performed, he must perform it".

13 *C. J.* 635, Section 706, cited in Assignment No. 2 (supra).

The trial court concludes that the defendant Irene Gladys Mapes is immune from this fundamental principle; that though she obligated herself to negotiate for the subsidiary terms, she had a perfect legal right to repudiate "without good cause", escape further negotiation, and violate her solemn written promise. A careful search has revealed no authorities in support of this obviously unwholesome doctrine. (See Assignment No. IX.)

5. The trial court ignores the fact that the contract is complete and definite in itself. It contains no condi-

tion that it shall become definite or complete only upon the happening of some future contingency. It is a contract *in praesenti,* for which the plaintiff was obligated to deposit, and did deposit, ten thousand ($10,000.00) dollars in cash as an evidence of good faith. (Assignment No. X.) The further fact that the contract provided for the formal and later execution of a lease, *did not negative the existence of the contract, the terms of which had been assented to and agreed upon.* (See Assignments Nos. XI and XII and citations, supra.)

6. The trial court, in excusing and exempting the defendant Irene Gladys Mapes from further negotiation, ignored a well known maxim of equity, namely, "Equity regards as done that which ought to be done." (See Assignment No. XII.) This maxim is strikingly applicable here. The defendant suddenly closed the doors against negotiation. Her unwarranted defeat of plaintiff's right left him no alternative but to rely upon a decree of a court of equity to apply this established maxim. Since the defendant ought to have proceeded to further negotiation and deliberately refused, the trial court should have regarded negotiations "as done", and granted relief upon the material and essential provisions of the contract as confessedly agreed upon.

7. The trial court ignored the well established doctrine of equitable estoppel. The defendants should have been estopped from setting up their own wilful breach of the contract as a defense. This serious contention, based upon sound equitable principles, has

been submitted supra with numerous citations of authority.

8. The trial court ignored another well established doctrine of equity, namely that the solemn promise of the defendants to negotiate further, was a condition precedent which they are prohibited, in equity, from setting up as a defense in the face of their conceded wilful repudiation. This point has been likewise presented supra, with citations of authority.

9. The trial court concludes as an additional reason for denying specific performance that if such were decreed, "the court would be compelling antagonistic parties to form a partnership or a relation in the nature of a partnership in the control and management of a large hotel." (Tr. Vol. 2, pp. 922-923.) This conclusion, in effect, declares the erroneous principle, first: that a valid contract entered into by one party with two other parties, who undertake a joint lease may be annulled and cancelled at will by first party, if the joint lessees become antagonistic in advance of active operations or, in fact, dissolve their joint relationship; and second, that though there be a valid, legal contract, if the first party breached without good cause, and there was no remedy at law, neither one of the second parties would have a remedy by way of specific performance. It is respectfully submitted that such is not established law or equity.

> "There is a fiduciary relation existing between joint tenants, joint vendees, and joint optionees, which gives to one the right to perform acts beneficial to the common estate. Certainly Shaeffer

and Herman by thus acting could not defeat the right of Shaeffer to insist upon a performance of the contract when he had complied with its terms. We therefore conclude, under the facts as found, that Shaeffer is in position to compel specific performance of the contract."

Shaeffer v. Herman, 85 Atl. 94, citation from page 96.

"It was asserted by the defendant upon the trial below that his contract with Horst brothers was annulled by the dissolution of that firm and the assignment by one partner to his co-partners of his interest therein. To this proposition we cannot assent. A contract was entered into by Roehm with the plaintiffs jointly, not with either of them separately. The dissolution of the firm in no way affected the obligations of any of the parties. The retiring member, Paul R. G. Horst was, notwithstanding his withdrawal, answerable to Roehm for the faithful performance of the contract; and in like maner Roehm was still bound to the remaining members of the firm. The same principle which would have permitted Roehm to compel the performance of the contract on the part of the plaintiffs, either in their partnership or individual capacities, enables them, in the same way and to the same extent, to require him to observe the obligations entered into on his part."

91 Fed. 345, 33 C.C.A. (3rd) 550, Affirmed 20th Supreme Court 780, 178 U.S. 1, 44 L. Ed. 953, citation from 91 Fed. at 346.

"There is no evidence that the parties continued to do business under the name of Von Breton-

Rothwell Optical Company, or that a partnership of that name was ever formed; and, if they did so, it would be wholly immaterial to the issues of the case. The respondent had covenanted with the two Rothwells that he would not engage in a same business in Los Angeles for his own benefit, or for the benefit of any person or firm other than the Rothwell Optical Company. As this firm was dissolved, then respondent was not entitled to engage in the business in Los Angeles for anyone. * * * In any event, Chester Rothwell, as one of the parties beneficially interested in the covenant, was entitled to enforce its obligation."

Rothwell v. Vaughn, 193 Pac. 611 at 613 (1920).

"The complaint did not allege a transfer of the contract to the plaintiff or an assent of the defendants to an assumption of it by him individually; nor did it allege notice to the defendants that he was undertaking to perform it in an individual capacity. It only alleged that the plaintiffs partners had notified the defendants that they had withdrawn from the partnership, and that the plaintiff continued to get out logs under the original contract. This was an inferential allegation and he was acting in performance of the still subsisting obligation of the partnership. It is a general rule of law, wanting provisions in the contract to the contrary, that a partnership and all of its members continue bound by its contracts not performed even after dissolution, and that one partner has power to proceed with the performance of such a contract for the firm. * * * A dissolution does not ordinarily absolve the

other party to the contract from his contractual obligation to the firm; there being no actual abandonment by all of the members of the firm. 30 Cyc. 661. It follows that the partners were necessary parties to the action for an alleged breach of contract, which was, so far as the complaint showed, still a subsisting contract of the partnership in its relation to the defendants, whatever the agreement of the partners among themselves."

Dew v. Pearson, 132 P. 412 at 413 (1913, Washington).

In further emphasis upon this point, it should be noted here that the defendant Charles W. Mapes, Jr., appellant's co-lessee, became, on November 6, 1947, *a few weeks after the contract was executed, an actual one-third owner in the property by virtue of a conveyance made to a partnership, of which all the personal defendants share an equal one-third interest.* (Tr. Vol. 2, p. 474. See also p. 499.) It follows, therefore, that there was a dual fiduciary relationship between the defendant Charles W. Mapes, Jr. and this appellant, which obligated him, in two capacities, to respect the contractual rights of appellant. It is also clear from the evidence, that *all* the defendants cooperated to defeat appellant out of his just rights.

10. The trial court has erroneously concluded that the solemn written contract in evidence here was a mere scrap of paper to be torn up and thrown in the wastebasket at the will and caprice of any party thereto, and that this was the intention of the parties when they entered into it.

THE COURT HAS AMPLE JURISDICTIONAL AUTHORITY TO DECREE SPECIFIC PERFORMANCE HEREIN AND ACCORD EQUITY AND JUSTICE TO THE WRONGED APPELLANT.

The Supreme Court of Nevada has announced the general rule in this State applicable to the remedy of specific performance, which has never been modified or reversed, and is still in full force and effect. The rule is as follows:

> "Courts of equity ought to determine the rights of parties according to the broad principles of justice and fair dealing and not by the technical and refined distinctions of the law."
>
> *Schroder v. Geminder,* 10 Nev. 355.

And in another Nevada case, in which it was contended "that the memorandum was merely preliminary and that it was contemplated by the parties that something yet was to be done, that further conferences were to be had" (which is one of the contentions here) the Supreme Court of Nevada held that the parties, having reached an agreement upon the *essential terms,* specific performance should be decreed.

> *Dondero v. Turrillas,* 59 Nev. 374, 94 Pac. (2d) 276, citation from page 394 Nevada Report.

> "There has been a progressive tendency in the United States to increase the number of cases in which money damages are not regarded as an adequate remedy, with a resulting greater liberality in granting decrees for specific performance."
>
> *Restatement of the Law—Contracts,* Vol. 2, Sec. 358, p. 635.

"The decree need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract; it may be so drawn as best to effectuate the purposes for which the contract was made, and it may be granted on such terms and conditions as justice requires."

Ibid. Sec. 359, p. 638, par. 2.

"The function of the court is to do complete justice; and it has power to mold its decree to that end."

Ibid. Sec. 359, p. 639 par. (b).

"Specific performance is available to enforce a contract the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple."

Ibid. Sec. 360, p. 643, par. (c).

See also quoted last paragraph in *The Hydraulic Power Co. v. Pettibone Cataract Paper Co.* (supra).

It is therefore respectfully submitted that the prayer of plaintiff-appellant's amended complaint (Tr. Vol. 1, pp. 14-35), is sustained and justified, not only by the evidence, but by salutory principles of equity as hereinabove set forth. That the order and decree of the trial court in favor of the defendants should be reversed, and that specific performance of the contract should be ordered decreed in favor of the plaintiff-appellant herein.

Dated, Reno, Nevada,
November 5, 1947.

SAMUEL PLATT,
Attorney for Appellant.

No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs. Charles W. Mapes, CHARLES W. MAPES, JR., GLORIA MAPES, and CHAS. W. MAPES COMPANY (a co-partnership),

Appellees.

MOTION OF APPELLANT HEREIN FOR REIMBURSEMENT BY APPELLEES FOR CAUSING UNNECESSARY COSTS ON APPEAL.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the appellant above named, through his undersigned attorney, and moves the above entitled Court for an order requiring the appellees to reimburse appellant for unnecessary costs expended by him in the preparation and filing of the record on appeal herein, in the amount and upon the grounds and reasons following:

1. That appellant's "Designation of Contents of Record on Appeal" (Tr. Vol. II, page 940) includes "Transcript of Testimony reported by the Court Reporter." That appellees' "Designation of Additional Portions of Record, Proceedings and Evidence to be Included in Record on Appeal" includes "Notice of Motion by Defendants to Dismiss, and Subject Thereto, to Strike Portions of Plaintiff's Amended Complaint", and likewise includes not only the transcript of testimony reported by the court reporter, but all objections, and arguments and rulings thereon as reported in shorthand by the official court reporter.

(a) Such additional designation by appellees creates an unnecessary cost and expense for the reason that the notice of motion to dismiss and strike was overruled by the trial court, and no cross-appeal has been taken herein by appellees. Further, said motions and ruling thereon are not involved in this appeal.

(b) That the complete transcript of testimony reported by the court reporter, which appellant designated as a part of the contents of the record on appeal, contains all the rulings of the trial court, which with few exceptions were all in favor of the appellant herein. The appellees have taken no cross-appeal challenging these rulings. None of these rulings is involved in this appeal. Appellees' designation that the arguments of respective counsel be likewise included in the record has unnecessarily encumbered the record with additional unnecessary costs and expenses. That the court reporter, in order to include these arguments throughout the record, informed

appellant's counsel that such arguments could not be included unless the entire record were retranscribed. This accordingly was ordered and done. The cost of retranscribing the entire record, for which appellant paid, was in the sum of $422.00. That in addition to retyping this additional record, it was necessary that it be printed, with an increase of 272 in the number of printed pages. The number of extra pages was computed on the following basis:

The printed record comprising transcript of testimony consumed 791 pages, from page 116 to 907 inclusive. It was composed from 841 typewritten pages of the reporter's transcript. The reporter's transcript, as designated by the appellant, comprised only 552 typewritten pages, which would have composed into 519 pages of the printed record. In other words, appellant's selection of the transcript would have made up 519 pages of printed record as against 791 pages of printed record as designated by the respondents, the difference of 272 pages.

Cost of Completed record of 942 pages		$2140.00
Average cost per page		2.27
272 pages at $2.27 per page	$617.44.	

In addition there is the added cost of the retranscription of the entire record in incorporating respondents' arguments on objections, which created an increased cost of $422.00. $422.00 plus $617.47=$1039.44, which is the increased cost of the record caused by the respondents' demand for incorporating in such record his arguments on the objections and rulings.

Wherefore, appellant prays that an order enter herein ordering and directing the said appellees to reimburse the said appellant in the sum of $1039.44.

Dated, Reno, Nevada,
November 5, 1947.

SAMUEL PLATT,
Attorney for Appellant.